PUBLIC PROSECUTOR

v.

TAN KOK AN

HIGH COURT MALAYA, JOHOR BAHRU
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[CRIMINAL TRIAL NO. 45-1-1995]
6 OCTOBER 1995

EVIDENCE: *Charge of trafficking in dangerous drugs - Prosecution relying on the presumptions under s. 37(d) and s. 37(da)(i) of the Dangerous Drugs Act - Prosecution witnesses giving hearsay evidence - Whether admissible - Material witness not called by prosecution - Consideration of s. 114(g) of the Evidence Act 1950 - Whether adverse inference can be drawn against prosecution for failure to call material witness - Defence of innocent carrier - Whether defence had rebutted the statutory presumptions of possession and trafficking under s. 37(d) and (da) of the Dangerous Drugs Act 1950.*

The prosecution brought a charge of trafficking in dangerous drugs contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA 1952) against the accused. The prosecution evidence was that one Lim, who they had arrested for being in possession of dangerous drugs, revealed, under interrogation, that the drugs were supplied to him (Lim) by one Ah An. The prosecution gave evidence that Lim contacted Ah An through his handphone and that based on the conversation Ah An arrived at Lim's house with the drugs and was apprehended. The police officers involved in the apprehension further gave evidence that Lim identified the accused as Ah An. The prosecution failed to call Lim to give evidence and the statements made by Lim were adduced through other prosecution witnesses. The question that arose was whether Lim's statements were admissible and the effect of the failure of the prosecution to call Lim as a witness. The prosecution argued that the statements were admissible as they were not tendered to show the truth of the contents but to show that they were in fact made.

The accused defence was one of innocent carrier and the question that arose was whether the accused had managed to rebut the statutory provisions under s. 37(d) and (da) of the DDA 1952. In the course of the judgment the Court also considered the concept of wilful blindness as alluded to in the Singapore case of *Public Prosecutor v. Hla Win.*

Held:

[1] It was plainly obvious that the prosecution sought to establish through the back door the crucial ingredient of knowledge through what Lim purportedly had said to SP8 and who in turn translated it to SP6. SP8's evidence is

second hand while SP6's evidence is third hand. In the circumstances the evidence given by both SP6 and SP8 can best be described as worthless. Since Lim was not called by the prosecution, the best evidence available was not produced by the prosecution.

[2] A statement made by a person not called as a witness is inadmissible to prove the truth of the fact stated. The purpose of introducing Lim's purported statements through SP6 and SP8 was solely to establish knowledge of the heroin in the plastic bag on the part of the accused and that the accused was also known as Ah An. As knowledge is an essential ingredient of the offence of trafficking, the prosecution was in fact proposing to establish the truth of what Lim had said to SP6 and SP8 so as to secure a conviction against the accused.

[3] Lim was an important prosecution witness. He was acquainted with the facts of the whole case and, though he was present through-out the trial, the prosecution failed to call him to give evidence. Lim was in a position to give a first hand account of the whole episode and by keeping him at bay it was legitimate to draw an adverse inference under s. 114(g) of the Evidence Act 1950 against the prosecution. As for the person by the name of Sow Kiong who surfaced during the cross-examination of the accused, a perusal of the questions posed pertaining to his role in the case would leave no doubt that he too played a leading part in the unfolding of the narrative for the prosecution's case. In the circumstances it was proper to draw an adverse inference against the prosecution who being in a position to produce better evidence deliberately abstained from doing so.

[4] The accused has succeeded in creating a reasonable doubt as to his guilt in the context of the test in *Mat v. Public Prosecutor*. There was no reason for the accused to suspect that he carried heroin that day to the house in question. The accused was told by Gay Au that the plastic bag contained money and to the accused it was just an assignment to send the money to Lim. There was no evidence that the accused had dealt in drugs with Lim prior to this so as to impute knowledge on the part of the accused. In the circumstances the evidence adduced by the defence had rebutted the statutory presumption of knowledge under s. 37(d) and the statutory presumption of trafficking under s. 37(da) of the DDA 1952.

[Accused acquitted and discharged].

Obiter dictum:

The time has come to apply rigorously the doctrine of wilful blindness when one considers the question of knowledge. In the Malaysian context it is courteous to carry goods on behalf of one's friend to a third party. It is certainly discourteous to open those goods to see its contents before sending

it to a third party. However to apply the doctrine of wilful blindness successfully to any particular case would be solely dependent on the relevant inferences to be drawn by the trial Judge from all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses. Where the case for the prosecution is water-tight, the doctrine of wilful blindness should fail.

Cases referred to:
Public Prosecutor v. Hla Win [1995] 2 SLR 424 ***(dist)***
Public Prosecutor v. Jul bin Alih [1989] 2 MLJ 63 ***(refd)***
Public Prosecutor v. Abdul Aziz bin Yusof [1993] 1 CLJ 138 ***(refd)***
Public Prosecutor v. Chin Hock Aun [1989] 1 MLJ 509 ***(refd)***
Public Prosecutor v. Chuah Kok Wah [1994] 2 CLJ 423 ***(refd)***
Wong Kok Keong v. R [1955] MLJ 13 ***(refd)***
Packiam & Anor v. Public Prosecutor [1972] 1 MLJ 247 ***(refd)***
Lim Yam Hong & Co. v. Lam Choon & Co. [1928] AIR PC 127 ***(refd)***
Jagroop v. Rex [1952] AIR ALL 276, 277; 53 Cr. LJ 588 ***(refd)***
Teper v. R [1952] 2 ALL ER 447 ***(foll)***
Berkeley Peerage case [1811] 4 Camp. 401 HL ***(refd)***
Healy v. Jacobs [1827] 5 LJOS KB 180 ***(refd)***
Subramaniam v. PP [1956] 1 WLR 955, [1956] MLJ 220 ***(refd)***
Seneviratne v. R [1936] 3 ALL ER 36 ***(foll)***
Munusamy v. Public Prosecutor [1987] 1 MLJ 492 SC ***(refd)***
Gopal Krishnaji v. Md. Haji [1968] AIR SC 1413 ***(refd)***
Ti Chuee Hiang v. Public Prosecutor [1995] 2 AMR: 1879, [1995] 3 CLJ 1 ***(refd)***
Public Prosecutor v. Hla Win [1995] 2 SLR 424 ***(dist)***
R v. Griffiths ***(refd)***
Mat v. Public Prosecutor [1963] 29 MLJ 263 ***(foll)***
Mohamed Radhi bin Yaacob v. Public Prosecutor [1991] 3 MLJ 169 ***(refd)***
Sochima Okoye v. Public Prosecutor [1995] 3 CLJ 371, [1995] 1 MLJ 538 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), 37(da), 37(da)(i)

For the accused - Hisham Teh Poh Teik; M/s. Teh Poh Teik & Co.
For the public prosecutor - Mohd. Zawawi bin Salleh, DPP

JUDGMENT

Abdul Malik Ishak J:

The accused was acquitted and discharged after his defence was called upon the following charge:

> Bahawa kamu pada 11.9.93 lebih kurang jam 9.45 malam, di sebuah rumah no: 55, Jalan Kekabu 7, Taman Desa Cemerlang, Ulu Tiram, dalam daerah Johor Bahru, dalam Negeri Johor telah di dapati mengedar dadah berbahaya iaitu 45.7 gram heroin dan dengan itu kamu telah melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh di hukum di bawah s. 39B(2) Akta yang sama.

The facts garnered from the prosecution witnesses can be states thus.

On 11 September 1993 at 2.25 a.m., Chief Inspector Nordin bin Kadir (SP6 - "Nordin") led a police party and raided house number 55, Jalan Kekabu 7, Taman Desa Cemerlang, Ulu Tiram ("house"). In that house, Nordin and his police party arrested Lim Jin Kue ("Lim") and Yoo Nai Chau ("Yoo"). That house belonged to Lim and in Lim's room the police recovered some drugs. On Yoo's wallet, the police also recovered four plastic packets of heroin. In regard to these arrests, Nordin lodged a police report *vide* Ulu Tiram report no. 3364-6/93 (P18). Under interrogation, Lim buckled and revealed that he obtained the drugs from one person by the name of Ah An who hailed from Masai who would normally send the drugs to Lim at Lim's house. Lim also said that he could contact Ah An via the pager system. Later at the police station in the presence of Nordin, Detective Lance Corporal 97279 Chong Chin Sin (SP8 - "Chong") and Detective Sergeant 31901 Choong Kue Hin ("Sergeant Choong"), Lim contacted Ah An twice through his own hand phone and succeeded in contacting Ah An via Ah An's pager. Ah An returned Lim's call and both of them spoke in the Hokkien dialect. According to Chong, the conversation between Lim and Ah An in the Hokkien dialect went like this:

Lim said: "Ada barang ke? Saya mahu setengah kereta."

According to Chong, the words "setengah kereta" referred to a half pound heroin. Chong then testified that Lim told him that Ah An would deliver the heroin to the house before midnight of that night. Chong then translated what had transpired to Nordin. Nordin testified that the telephone conversation between Lim and Ah An lasted for 2 to 3 minutes only. I shall revert to this piece of evidence in the later part of this judgment. Based on this information, Nordin swung into action. Nordin called for a meeting and there he briefed his police personnel in regard to the raid that was scheduled to take place in that house. After the briefing, Nordin led his police party together with Lim to that house on 11 September 1993 and arrived there at about 7.00 p.m. They then waited for the arrival of Ah An. In that house, Nordin located himself in the masters bedroom overlooking the road as reflected in photographs P18A, P18B, P18H and at "F" of the sketch plan (P11) together with Lim, Chong and Sergeant Choong. The rest of the police party took up positions in the other parts of the house. Incidentally, that was the masters bedroom of Lim. The area outside the house was quite bright as the street light located directly in front of the house was lighted then. At about 9.45 p.m., Nordin and Chong saw a dark grey van (as per photographs P9A and P9B) arrived and stopped by the side of the road along Jalan Kekabu 7. A male Chinese was seen alighting from the van and, whilst walking along Jalan Kekabu 7, was seen carrying a transparent plastic bag (photographs P7A and P7F) in his right hand. At this point of time, Lim who also witnessed the same incident remarked in Hokkien dialect to Chong: "Itu adalah Ah An." This was quickly translated to Nordin. Without further ado, Nordin directed Chong to escort Lim to the main

door of the house and there Lim was directed to open the main door partially (photographs P8B and P8E) and the grille thereto (photograph P8D) in order to show his face to Ah An. Lim obliged and having done that, Chong then escorted him to the masters bedroom. Meanwhile, Nordin and Detective Corporal 68296 Jamaluddin bin Tan (SP7 - "Jamaluddin") stood behind the main door from inside which was partially opened. As the male Chinese entered the main door carrying the plastic bag in his right hand, Nordin introduced his office as "**Polis**" and Jamaluddin swiftly grabbed hold of the left arm of that male Chinese and twisted it to the rear and pushed him forcibly to the floor of the living room face downwards. The plastic bag carried by the male Chinese dropped to the floor of the living room. That male Chinese appeared shocked and he struggled but was subdued by Jamaluddin and the rest of the police party. Nordin seized the transparent plastic bag and examined its contents in the presence of the male Chinese who was identified as the accused. Immediately inside the transparent plastic bag was a newspaper package (P5B and the photographs at P7B, P7C, P7D, P7E and P7F). On opening that newspaper package, Nordin saw a transparent plastic containing "**butiran**" suspected to be dangerous drugs. In due course, the government chemist confirmed the dangerous drugs to be heroin weighing 45.7 grammes.

It is abundantly clear that the accused was caught red-handed to have in his custody or under his control the transparent plastic bag which contained the heroin. The physical possession of the heroin triggered the provisions of s. 37(d) of the Dangerous Drugs Act 1952 ("Act") in that the accused shall be deemed to have in his possession such drug and to have known the nature of such drug, until the contrary is proved. As the quantum of the heroin was 45.7 grammes, by virtue of the provisions of s. 37(da)(i) of the Act, the accused shall be presumed, until the contrary is proved, to be trafficking in the said drug. Encik Hisham Teh Poh Teik, the learned Counsel for the accused, conceded that the prosecution succeeded in establishing a *prima facie* case against the accused and agreed that the defence should be called. The burden therefore shifted to the accused to rebut the presumptions on the balance of probabilities.

In his defence, the accused testified that on 11 September 1993 at about 5.30 p.m. after he finished work at his father's shop he proceeded to Michael's house at no. 30, Jalan Hijau Muda 6, Taman Pelangi, Johor Bahru ("Pelangi house") to play mahjong. Upon arrival there he saw four persons were playing mahjong. He identified them as Michael (Ng Loke), Arthur (Tan Yau Cheng), Au Yang (Au Yong Chin) and Ah Nok (Chua Hak Tai). Michael surrendered his seat and let the accused play mahjong at about 6.00 p.m. Between 8.45 p.m. to 9.00 p.m. Gay Au turned up and since he wanted to talk to the accused, the accused told him to wait for about 15 minutes. Gay Au waited and when finally Gay Au spoke to the accused it was within the hearing range of Michael. Gay Au requested the accused to send some money to Lim. According to Michael he overheard Gay Au asking the accused to send the

money which he won to someone but he did not know who that was. Thus, as soon as the accused and Gay Au left the premises of the Pelangi house, Gay Au proceeded to his car and collected a plastic bag which he said to contain money and handed it to the accused to be sent to Lim. The accused said that he accepted that assignment without being paid. The accused testified that he then placed the plastic bag in the glove compartment of the grey van as shown in photographs P9A and P9B without opening the plastic bag to see its contents. The accused believed Gay Au when he said that the plastic bag contained money as on two other occasions he had accompanied Gay Au to Lim's house for the same purpose. In other words, the accused least expected that the plastic bag contained drugs. On arrival at Jalan Kekabu 7, the accused parked the motor van (which belongs to the accused's mother) and held the plastic bag which was folded in his left hand whilst his right hand holding the ignition key to the motor van. The accused testified that he saw Lim's face appearing at the front main door of the house initially and suspecting nothing amiss he proceeded to enter the house. As soon as he entered the said house, someone grabbed hold of him and he put up a struggle but was eventually subdued. After he was arrested he was then informed that they were police personnel. The accused testified that he saw the police examine the contents of the plastic bag and he was then told that it contained drugs. The accused testified that he immediately told the police about Gay Au and that the plastic bag contained money. Under cross-examination, the accused denied the following set of facts:

(1) that Lim had contacted him twice on the pager;

(2) that Lim had ordered half a pound of heroin through the telephone;

(3) that he telephoned Lim and promised to send a half pound of heroin before midnight to that house;

(4) that he was also known as Ah An;

(5) that Gay Au was a fictitious character; and

(6) that he knew that the plastic bag contained drugs.

It is germane to remember that although the accused agreed that if he wanted to open the plastic bag he could do so yet he said that he did not open the plastic bag nor check its contents. The accused even said that although he held the plastic bag in his left palm (as demonstrated in Court) yet he could not feel the "**dadah**" therein. He categorically stated that he did not know that the plastic bag contained drugs and, if he did, he would not have carried the drugs.

Surprisingly, in an unprecedented move the learned Deputy Public Prosecutor, Encik Mohd. Zawawi Salleh, introduced an entirely different character during the cross-examination of the accused. This character never appeared at all during the prosecution's case and that character was Sow Kiong. No wonder the accused denied whatever allegations that tied him to Sow Kiong.

Michael (SB2) testified on behalf of the accused and from the tenor of his evidence, Gay Au was also known as Ah Geh and that he had known Gay Au for approximately four months. Michael too confirmed that Gay Au requested a favour from the accused to send the money to someone.

It is crystal clear that the defence was one of innocent carrier. Of late, this defence is becoming popular and invariably an accused person when caught red-handed would resort to this defence (*Public Prosecutor v. Jul bin Alih* [1989] 2 MLJ 63; *Public Prosecutor v. Abdul Aziz bin Yusof* [1993] 1 CLJ 138; *Public Prosecutor v. Chin Hock Aun* [1989] 1 MLJ 509; and *Public Prosecutor v. Chuah Kok Wah* [1994] 2 CLJ 423). In classical terms: "I did not know it contained drugs. I knew it contained money", was the defence of the accused and my task is to sort out the innocent from the guilty within the bounds of accepted legal principles. This is a demanding task and there is no room for mistakes. What the prosecution now sought to argue was that this Court should find that the story of the accused that he believed that he was carrying money as a mere fabrication and that in truth he knew or ought to have known that he was carrying heroin. Encik Mohd Zawawi bin Salleh ably argued and brought home the message that the accused was not an innocent custodian of the plastic bag; that the accused had opportunities to inspect the plastic bag and sadly he chose not to do so. The plastic bag was transparent and it was not locked. The newspaper which was inside that transparent plastic bag too was not locked nor secured in such a fashion as to prevent inspection. It was said that the accused's lack of compulsion to check the contents of the plastic bag was an incredible piece of evidence that would be difficult to swallow. In truth, it was submitted that the accused knew or that he must have known that he was carrying the drugs for Gay Au and, consequently, he was trafficking it.

The prosecution sought to link knowledge on the part of the accused to the heroin that he carried that night to the house with the telephone conversation between the accused and Lim. Indeed that was a damning piece of evidence, if it was admissible. The prosecution too sought to establish that the accused was in fact Ah An through the reaction of Lim when he identified the accused as Ah An immediately before the accused was arrested. Again, this would be a damning piece of evidence, if it was admissible. The crucial question to ask is this: Whether the evidence of Nordin and Chong in regard to what Lim purportedly told them would be admissible bearing in mind that Lim was not called but offered to the defence? Though the defence did not object when such evidence was adduced. Yet it is now trite that what is inadmissible cannot

become admissible by reason of the failure to object and I must therefore disregard such evidence (see *Wong Kok Keong v. R* [1955] MLJ 13 at p. 16 as cited in *Packiam & Anor v. Public Prosecutor* [1972] 1 MLJ 247; *Lim Yam Hong & Co. v. Lam Choon & Co.* [1928] AIR PC 127, 128). In so far as what Lim purportedly had said to Chong and subsequently Chong translated those parts to Nordin they can best be described as worthless. Chong's evidence is second hand whilst Nordin's evidence is third hand. Since Lim was not called by the prosecution, I am left to conjecture whether Lim actually uttered those words. Through-out the trial, Lim was present and his presence was felt and seen each time he was identified by Nordin, Chong and even the accused. Without Lim, the best evidence was not produced by the prosecution. It is plainly obvious that the prosecution sought to establish through the back door the crucial ingredient of knowledge through what Lim purportedly had said to Chong and who in turn translated it to Nordin. The test to distinguish between direct and hearsay evidence is this: "It is direct if, to act upon it, the Court has to rely upon only the witness, whereas it is hearsay if it has to rely upon not only the witness but some other person also" (*Jagroop v. Rex* [1952] AIR ALL 276, 277; 53 Cr. LJ 588). In lucid terms Lord Normand in *Teper v. R* [1952] 2 ALL ER 447 explained it in this way:

> The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.

Put differently, it may be said that a statement made by a person not called as a witness (like Lim here) is inadmissible to prove the truth of the fact stated (*Berkeley Peerage* case [1811] 4 Camp. 401 HL at p. 415; *Healy v. Jacobs* [1827] 5 LJOS KB 180). There is also a danger that Chong and Nordin in their overzealous attempt to secure a conviction might concoct, fabricate and tailor their evidence to suit the charge levied against the accused. This must surely be the danger that compels the rule against the admission of hearsay evidence to be developed and refined over the years. The learned Deputy Public Prosecutor sought to argue, quite forcefully, that he merely wanted to establish not the truth of the statement but the fact that it was made. This immediately brings to the forefront the decision of the Board in *Subramaniam v. PP* [1956] 1 WLR 955 at p. 970; [1956] MLJ 220 at p. 222 where it was stated that:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

As stated earlier, the purposes of introducing Lim's purported statements through Chong and Nordin were solely to establish knowledge of the heroin in the plastic bag on the part of the accused and that the accused was also known as Ah An. As knowledge is an essential ingredient of the offence of trafficking, the prosecution was in fact proposing to establish the truth of what Lim had said to Chong and Nordin so as to secure a conviction against the accused. This is clearly wrong and should be avoided at all costs.

Next, it is undeniable that Lim was an important prosecution witness. He is the umbilical cord to link the accused with the heroin. Without Lim, the whole fabric of the prosecution's case collapsed to the ground like a deck of playing cards. Lim was certainly acquainted with the facts of the whole case and, though he was present through-out the trial, the prosecution took a perilous course in not calling him. Lim was able to give a first hand account of the whole sordid episode to the Court and by keeping him at bay, it is legitimate for me to draw an adverse inference under s. 114(g) of the Evidence Act. As Lord Roche in *Seneviratne v. R* [1936] 3 ALL ER 36 said:

> ... witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

In the same vein, Mohamed Azmi SCJ (now FCJ) in *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 SC aptly said:

> It is essential to appreciate the scope of s. 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

Now, in regard to the character by the name of Sow Kiong that suddenly surfaced during the cross-examination of the accused and on perusal of the questions posed by the learned Deputy Prosecutor pertaining to his role in the case, one is left with no doubt at all that he too played a part and an essential protagonist, so to speak, in the unfolding of the narrative for the prosecution's case. It would not therefore be wrong for me to draw an adverse inference against the prosecution who being in a position to produce better evidence deliberately abstained from doing so (*Gopal Krishnaji v. Md. Haji* [1968] AIR SC 1413).

Reverting back to Lim, it is germane to mention that had he been called he would definitely confirm and allude to the following set of questions:

(1) whether he made two calls to the paging centre to locate Ah An?

(2) whether he in fact spoke to Ah An over the telephone on the day in question?

(3) whether he ordered half a pound of heroin from Ah An?

(4) whether the accused was known as Ah An or Gay Au?

(5) whether he told Chong in the presence of Nordin in his masters bedroom that the accused, referring to Ah An, had arrived?

Thus, in the absence of Lim, this Court must tread cautiously and with circumspection. In the circumstances, when the accused testified under oath that he did not speak to Lim over the telephone and that he did not promise to send half a pound of heroin to that house, this Court has no choice but to accept such assertions as gospel truths. Only Lim can positively say whether he spoke to Ah An or Gay Au, but, alas, he was not called by the prosecution (*Ti Chuee Hiang v. Public Prosecutor* [1995] 2 AMR : 1879).

It is my judgment, that the hearsay evidence rule would be rigorously applied so as to render inadmissible those parts which Lim purportedly said to Chong and who in turn purportedly translated to Nordin. Bereft of these juicy and cogent parts, so to speak, the case for the prosecution would solely rest on the evidences of Nordin, Chong and Jamaluddin to the effect that they saw the accused carry the plastic bag containing the heroin in his right hand to the house that night. At this juncture, the question to ask is this: Has the defence succeeded in rebutting the presumptions on the balance of probabilities? The prosecution argued that Gay Au was nothing but a fictitious character coined up by the accused. To this argument, there is ample corroborative evidence through Michael (SB2) that Gay Au in fact existed. In fact, had Lim been called he would be able to rebut that part of the allegations by the accused that he went to the house twice prior to the arrest with Gay Au. It is my finding of fact, on the available evidence, that there was a person by the name of Gay Au and it was he that requested the accused to send the money to that house, in particular to Lim. It is also my finding of fact that the accused was not known by the name of Ah An and he was not Ah An as alleged by the prosecution. Now, given this scenario the accused's task of rebutting the presumption's on a balance of probabilities must surely have been rendered extremely difficult from the outset. As I said in the early part of this judgment, it is a common phenomenon for drug couriers to raise the now well-known and common defence that they were deceived by some one else and that they carried less incriminating articles other than drugs. Here, the accused pointed the blame to Gay Au and he said that he was framed and deceived by Gay Au into believing that what he carried was money. This brings me to an interesting concept of wilful blindness as alluded to by Yong Pung How CJ (Singapore) in *Public Prosecutor v. Hla Win* [1995] 2 SLR 424 where his Lordship in a dissenting judgment had this to say:

a It must be appreciated that the concept of wilful blindness qualifies the requirement of knowledge (see *R v. Griffiths* [1974] 60 Cr. App. R. 14). As Professor Glanville Williams aptly remarked in his Textbook on *Criminal Law*, at p. 125:

> ... the strict requirement of knowledge is qualified by the doctrine of wilful b blindness. This is meant to deal with those whose philosophy is : 'Where ignorance is bliss, 'tis folly to be wise.' To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know.

c In another part of the same judgment, his Lordship Yong Pung How CJ (Singapore) observed:

> At this juncture, I emphasize that where the accused, who is not an innocent custodian in the sense that the drugs were planted in his bag without his being aware of them, accepted the goods in circumstances which rendered the taking of the precaution of satisfying himself that the goods were what they purported d to be and were not drugs an imperative, then, if he did not take the trouble to inspect them, but merely relied on another person's assurance, he would not rebut the statutory presumption of knowledge. In fact, he would be guilty of wilful blindness to the obvious truth of the matter.
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> e In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial Judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

It is pertinent to note that in *Public Prosecutor v. Hla Win* (*supra*), the respondent there was acquitted of the charge of importing into Singapore 3,468 f grammes of diamorphine. The prosecution had appealed against the acquittal and the majority decision of the Singapore Court of Appeal upheld the acquittal and dismissed the appeal. L.P. Thean JA speaking for the majority, *inter alia*, had this to say (see the headnote at p. 425):

> It was for the respondent to rebut the statutory presumptions of possession of g the drugs and knowledge of the nature of the drugs. It was a difficult task in the circumstances because the respondent had the *mens rea* to smuggle gems and knew of the illicit nature of the content of the bag. Furthermore, the defence put forth by the respondent was one commonly used by drug couriers. However, it was not the law that by reason of the respondent's knowledge of the illicit nature of the contents of his bag, his evidence that he did not know that the h contents were drugs could not and should never be believed. Such knowledge only rendered it more difficult for the Court to believe his evidence. Very much depended on the circumstances of the case.

Here, the accused knew that he was delivering some money in the plastic i bag to Lim. There was nothing illicit, in the context of this case, for the accused to carry that money in the plastic bag for delivery to Lim. This is the distinguishing feature between this case and that of *Public Prosecutor v. Hla Win* (*supra*). It is therefore far easier for this Court to hold, as what

was alleged by the accused, that he did not know that the contents of the plastic bag were drugs for, after all, he had accompanied on two previous occasions Gay Au to Lim's house for the purpose of sending money and not drugs there.

In *R v. Griffiths* (*supra*) where on a charge of handling stolen goods, contrary to s. 22(1) of the Theft Act 1968, to direct the jury that the offence is established if the defendant, suspecting that the goods were stolen, deliberately shut his eyes to the circumstances as an alternative mode of proof of guilt to proof of knowledge or belief on the part of the defendant that the goods were stolen is a misdirection. Lord Justice James held, *inter alia*, that to direct the jury that, in common sense and in law, they may find that the defendant knew or believed the goods to be stolen because he may deliberately close his eyes to the circumstances is a proper direction.

The time has come to apply rigorously the doctrine of wilful blindness when one considers the question of knowledge. In the Malaysian context it is courteous to carry goods on behalf of one's friend to a third party. It is certainly discourteous to open those goods to see its contents before sending it to a third party. That would be the courteous behaviour of right thinking Malaysians. But I hasten to add, lest I be accused of opening the floodgate, that to apply the doctrine of wilful blindness successfully to any particular case would be solely dependent on the relevant inferences to be drawn by the trial Judge from all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses. Where the case for the prosecution is water tight, the doctrine of wilful blindness should fail. As Lord Justice James said in *R v. Griffiths* (*supra*):

> Further, although the direction at p. 10 could have been better expressed than in the words 'a man in law in those circumstances knows or believes,' we are satisfied that the direction read in its entirety is that the jury had to be satisfied of either knowledge or belief and that one approach to that issue on the facts was to decide whether the appellant suspected the candlesticks were stolen and adopted an attitude of wilful blindness to the circumstances of receipt. We, therefore, conclude, after some doubt, that there was no misdirection and that the appeal fails on this point as it does upon the first point tabled. We would add that had we decided that there was in this respect a misdirection, we would have had no hesitation in applying the proviso. The evidence was overwhelming and no reasonable jury on this evidence could have arrived at a conclusion other than that the appellant believed the goods were stolen.

In my judgment, the defence of the accused came squarely within the classical case of *Mat v. Public Prosecutor* [1963] 29 MLJ 263 (hereinafter referred to as the "Mat test") where Suffian J (as he then was) in simple and exact terms said:

(c) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt ... Acquit.

Without Lim, the accused can put up any probable line of defence so long as that defence can raise a reasonable doubt in the mind of the Court as to his guilt. This was what was done by the accused and I must say he has succeeded in creating a reasonable doubt in my mind as to his guilt in the context of the Mat test. There was no reason whatsoever for the accused to suspect that he carried heroin that day to the house in question. To the accused it was just an assignment to send the money to Lim and the accused did not suspect any thing fishy. There was no evidence that the accused had dealt in drugs with Lim prior to this as to impute knowledge on the part of the accused. Gay Au told the accused that the plastic bag contained money and the accused must have been willing to send that money to Lim and I hold as a fact, as adverted to by the accused, that the accused would not have carried that plastic bag had he known that it contained drugs. I have seen the accused perform in the witness box and I ruled that his credibility was par excellence. This is also true for Michael.

In my judgment, the evidence of the defence has rebutted the statutory presumption of possession under s. 37(d) of the Act. Additionally, it is also my judgment that the defence has rebutted the statutory presumption of trafficking under s. 37(da) of the Act (*Mohamed Radhi bin Yaacob v. Public Prosecutor* [1991] 3 MLJ 169 as applied in *Sochima Okoye v. Public Prosecutor* [1995] 1 MLJ 538). I have no choice but to acquit and discharge the accused at the close of the defence case.